

Casale Industries, Inc. and Sheet Metal Workers' International Association, Local Union No. 28, AFL-CIO, Petitioner.

Paul Miller Sheet Metal Works, Inc. and Sheet Metal Workers' International Association, Local Union No. 28, AFL-CIO, Petitioner.
Cases 22-RC-9967 and 22-RC-9970

May 28, 1993

DECISION ON REVIEW AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT
AND RAUDABAUGH

On December 6, 1989, the Regional Director for Region 22 issued a Decision and Direction of Election, in which he directed an election in a unit composed of all sheet metal workers employed by the 17 members of the Sheet Metal Contractors' Association of Union, Morris, Somerset, and Sussex Counties (the Association),¹ which had delegated to the Association the authority to negotiate on their behalf.² Thereafter, in accordance with Section 102.67(b) of the Rules and Regulations of the National Labor Relations Board, the Petitioner and the Intervenor, Sheet Metal Workers Local 22 of New Jersey (Local 22), filed timely requests for review of the Regional Director's decision. By order dated February 7, 1990, the Board³ granted both requests for review.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

This case presents the following issues: (1) whether the collective-bargaining agreement between the Association and Local 22 covering a multiemployer bargaining unit was entered into pursuant to Sections 9(a) or 8(f) of the Act; (2) whether the instant petitions, seeking single-employer units, were filed within a reasonable time after recognition was extended to Local 22 by the Association; (3) if the petitions were not filed within a reasonable time, whether the Regional Director properly gave Petitioner additional time to submit a sufficient showing of interest in the multiemployer bargaining unit; and (4) whether the Regional Director properly applied the Board's special construction industry eligibility formula.

¹ The Sheet Metal Contractors' Association and Sheet Metal Workers' Local 22 of New Jersey were permitted to intervene in this proceeding.

² Those 17 employers are: Buist, Inc.; Casale Industries, Inc.; Erection Service Co.; E & R Industries, Inc.; Finan Sheet Metal, Inc.; Industrial Climate Control Systems; International Sheet Metal & Plate Manufacturing, Inc.; Metropolitan Panel Systems, Inc.; Paul Miller Sheet Metal Works, Inc.; Morristown Sheet Metal Co., Inc.; William Raugh & Son, Inc.; Raritan Mechanical, Inc.; Saxon Sheet Metal, Inc.; Scotia Sheet Metal, Inc.; Valairco, Inc.; Westfield Sheet Metal Works, Inc.; and Will-Rich Air Control Co., Inc.

³ Chairman Stephens and Members Cracraft and Devaney.

The Board has carefully considered the entire record in this matter, including the parties' briefs on review, and, for the reasons set forth below, finds that: (1) the collective-bargaining agreement between the Association and Local 22 was entered into pursuant to Section 9(a) of the Act; (2) the petitions seeking single-employer units were not, under *Comtel Systems Technology*,⁴ filed within a reasonable time after the Association extended 9(a) recognition to Local 22 and, therefore, the petitioned-for units are not appropriate because they are not coextensive with the recognized multiemployer bargaining unit; (3) under *Brown Transport Corp.*,⁵ the Regional Director properly afforded the Petitioner additional time to submit the required showing of interest in the multiemployer bargaining unit; and (4) the Regional Director should now apply the Board's special construction industry eligibility rules set forth in *Steiny & Co.*⁶

The relevant facts are undisputed. Casale Industries is a construction industry employer engaged in the manufacture of metal products. Paul Miller Sheet Metal Works is a construction industry employer engaged in sheet metal work. Casale and Paul Miller have been members of the Association since its inception in 1968. Neither Employer has revoked its authorization designating the Association as its bargaining agent.

The Association has been party to a series of collective-bargaining agreements with Local 22. Prior to 1982, Local 22 had been an affiliate of the Sheet Metal Workers' International Union (the International). During November 1981, Local 22 disaffiliated from the International and, thereafter, filed a petition in Case 22-RC-8690, seeking certification as the exclusive bargaining agent for all employees employed by Association members. Locals 19, 27, and 28, affiliated with the International, intervened in that proceeding. The Board directed an election in a unit of employees employed by 13 employers in the Association. The parties previously had agreed, however, that if the Board directed an election, Local 22 would withdraw its petition and an election would be conducted by the American Arbitration Association. On August 19, 1982, the parties modified their agreement to provide that the Honest Ballot Association (HBA) would conduct an election in a unit of employees employed by the 26 employers who were then members of the Association. The agreement, as modified, provided that the ballot would reflect two choices: Local 22 of New Jersey, or Locals 19, 27, and 28 of the International (collectively), and that the winner of the election would be recognized by the employers as the collective-bargaining agent "as if the election had been conducted by

⁴ 305 NLRB 287 (1991).

⁵ 296 NLRB 1213 (1989).

⁶ 308 NLRB 1323 (1992).

the NLRB itself and an appropriate certification(s) issued.”

The HBA sent notices of election to members and former members of Local 22. An election was conducted by the HBA on September 10, 1982, during which the individuals were given a choice of voting for Local 22 (unaffiliated), or Locals 19, 27, and 28 affiliated with the International. Local 22 received 315 of the 468 valid votes cast.⁷ The results of the election were tabulated Association-wide; ballots were not segregated by employer and there was no indication of the tally among each member-employer's employees. None of the parties objected to the conduct of the election, and the HBA certified Local 22 as the bargaining representative for the employees employed by the Association members.

On September 29, 1982, Local 22 and the Association entered into a written recognition agreement based on the results of the election. Since then, the Association and Local 22 have been parties to four successive collective-bargaining agreements, the third of which expired in August 1988. On June 3 and 6, 1988, during the open period of the third collective-bargaining agreement, Local 28 filed petitions seeking to represent separate units of employees employed by Casale and by Paul Miller. On September 1, 1988, the Association and Local 22 executed their fourth collective-bargaining agreement.

The Regional Director found that under *John Deklewa & Sons*,⁸ Local 22 had met its burden of demonstrating that the voluntary recognition extended to it by the Association was based on a showing of majority support, as evidenced by the election conducted in 1982 and, therefore, the contract between the Association and Local 22 was entered into pursuant to Section 9(a) of the Act. The Regional Director further found that in view of the multiemployer bargaining history on a 9(a) basis, the appropriate unit for purposes of collective bargaining was a multiemployer unit, rather than the single-employer units sought by the Petitioner. The Regional Director thereupon directed an election in a unit consisting of the employees of the 17 employers that had participated in negotiations for the last contract.

The Petitioner contends that employees of a single employer cannot be prevented from expressing their representational desires simply because their employer joined a multiemployer association. The Petitioner argues that even if the multiemployer bargaining unit could constitute an appropriate unit, the majority showing must be demonstrated on a single-employer basis to satisfy the requirements for 9(a) status under

Deklewa.⁹ Because there was no showing that a majority of the employees of either Paul Miller or Casale voted to be represented by Local 22, the Petitioner argues that the contract cannot be Section 9(a) with respect to either Employer.¹⁰

The Appropriate Unit

The Petitioner seeks to represent separate units of employees of Paul Miller and Casale. These two employers are engaged in the construction industry. They are also part of a multiemployer association. If the multiemployer relationship with the Union is governed by Section 9, rather than Section 8(f), and if Miller and Casale are validly a part of that Section 9 relationship, the petitions for single-employer units must be dismissed. Thus, the issue is whether these relationships are governed by Section 9, rather than Section 8(f).

Under *Deklewa*, the Board presumes that parties in the construction industry intend their relationship to be an 8(f) relationship.¹¹ Thus, the burden is on the party who seeks to show the contrary, i.e., that the parties intend a Section 9 relationship.

In the instant case, it is clear that the parties intended a Section 9 relationship. The parties agreed to hold an election and further agreed that the winner would be recognized by the employers “as if the election had been conducted by the NLRB itself and an appropriate certification(s) issued.” As no showing of majority status is necessary to establish an 8(f) relationship, the very fact that the parties agreed to hold an election indicates that they intended to establish a 9(a) relationship by proof of majority support. The parties’ analogy to Board certification (which is extended only to 9(a) representatives) is further evidence that they meant to create a 9(a) relationship. Plainly, if the parties had intended only an 8(f) relationship, it would have been entirely unnecessary for them to have entered into these agreements and to have used these procedures.

Of course, even where parties intend a 9(a) relationship, that intention will be thwarted if the union does not enjoy majority status at the time of recognition. Clearly, if majority status is challenged within a rea-

⁷The evidence does not establish exactly how many employees were eligible to vote, although Local 22 claims, without contradiction, that virtually all eligible employees voted.

⁸282 NLRB 1375 (1987).

⁹The Petitioner asserts that the petitioned-for employees cannot be bound to the multiemployer bargaining unit unless the employees at each respective shop vote separately to select the union as their bargaining representative, because an employer cannot bind its employees to representation in a multiemployer unit without the employees’ express or implied consent, citing former Member Dennis’ concurrence in *C.I.M. Mechanical Co.*, 275 NLRB 685 (1985).

¹⁰The Petitioner also argued that the “election” conducted by the Honest Ballot Association was insufficient to establish a 9(a) relationship between Local 22 and the Association because: the Honest Ballot Association election lacked Board safeguards; there was no “no union” choice on the ballot; and the certification was devoid of any delineation of the appropriate unit or the participants.

¹¹*John Deklewa & Sons*, supra at 1387 fn. 41.

sonable time, and majority status is not shown, the relationship will not be a valid 9(a) relationship.¹²

In the instant case, there is at least a substantial question as to whether majority status has been shown. In this regard, we note that the employees were not presented with a “no-union” choice. Further, quite apart from this problem, there was no separate tally of the votes of the employees of Casale and Miller.¹³ However, the challenge to majority status came 6 years after Section 9 recognition was extended and accepted. The parties reached agreement on three successive contracts during that period. The issue before us is whether to permit a challenge to majority status after 6 years of stability in a multiemployer relationship.

We will not permit the challenge. Our conclusion that the petitions should not be processed in single-employer units is based on the proposition that a challenge to majority status must be made within a reasonable period of time after Section 9 recognition is granted. In *Comtel*, the Board’s statement of the governing principles included a requirement that the challenge to majority status be made within a reasonable period of time.¹⁴ In the instant case, the Section 9 recognition was extended 6 years before the challenge to majority status. For the reasons that follow, we believe that this 6-year period was more than a reasonable period of time.

In nonconstruction industries, if an employer grants Section 9 recognition to a union and more than 6 months elapse, the Board will not entertain a claim that majority status was lacking at the time of recognition.¹⁵ A contrary rule would mean that longstanding relationships would be vulnerable to attack, and stability in labor relations would be undermined.¹⁶

These same principles would be applicable in the construction industry. In *Deklewa*,¹⁷ the Board said that unions in the construction industry should not be treated less favorably than those in nonconstruction industries. As shown above, parties in nonconstruction industries, who have established and maintained a stable Section 9 relationship, are entitled to protection against a tardy attempt to disrupt their relationship. Parties in the construction industry are entitled to no less protection. Accordingly, if a construction industry employer extends 9(a) recognition to a union, and 6 months elapse without a charge or petition, the Board should not entertain a claim that majority status was lacking at the time of recognition.¹⁸

¹² See *Comtel*, 305 NLRB 287 (1991).

¹³ *Ibid.*

¹⁴ *Id.* at 289.

¹⁵ *Bryan Mfg. Co.*, 362 U.S. 411 (1960).

¹⁶ *Id.* at 429.

¹⁷ *John Deklewa & Sons*, supra at fn. 53.

¹⁸ *Brannan Sand & Gravel Co.*, 289 NLRB 977 (1988), does not require a contrary result. There was no showing in that case that the parties intended a 9(a) relationship. Rather, the General Counsel ar-

Because the challenge to majority status in this case was made substantially more than 6 months after the grant of Section 9 recognition, we would not permit the challenge. Accordingly, we would not process these petitions in single-employer units.

Because we have found that the appropriate unit for an election in this case is the recognized multiemployer bargaining unit, the petitions seeking single-employer units cannot be processed unless the Petitioner is able to supply an additional showing of interest in the multiemployer unit.¹⁹ The petitions are not barred by the new contract executed by Local 22 and the Association after the petitions were filed and, under *Brown Transport Corp.*,²⁰ the Regional Director appropriately gave the Petitioner the customary 10 days to demonstrate that it had the necessary showing of interest to support an election in the broader unit.²¹

The Appropriate Eligibility Formula

Pursuant to the Board’s decision in *Steiny & Co.*, 308 NLRB 1323 (1992), the Regional Director shall apply the eligibility formula set forth therein.

ORDER

The Regional Director’s Decision and Direction of Election is affirmed, and the case is remanded to the Regional Director for further appropriate action, including permitting the Petitioner additional time to submit a showing of interest in the multiemployer bargaining unit found appropriate. On remand, the Regional Director is directed to determine employees’ eligibility to vote by use of the formula set forth in *Steiny & Co.*, supra.

MEMBER OVIATT, dissenting in part.

I do not agree that Local 22 was properly elected as the 9(a) majority representative in the Association-wide unit. Accordingly, I would reverse the Regional Director, find that the single-employer units are appropriate, and process Local 28’s election petitions in the separate units of employees at Paul Miller and Casale.

gued, unsuccessfully, that the Board should presume that pre-1959 relationships were 9(a) relationships. By contrast, in the instant case, there is a showing that the parties intended a 9(a) relationship.

Similarly, in *J&R Tile*, 291 NLRB 1034 (1988), and in *American Thoro-Clean*, 283 NLRB 1107 (1987), there was no showing that the parties intended to have a 9(a) relationship.

¹⁹ The Petitioner indicated at the hearing that if the broader unit was the only unit found appropriate, it was willing to proceed to an election in the broader unit. The Regional Director found however, and it is undisputed, that the Petitioner’s initial showing of interest was insufficient to support an election in the multiemployer unit.

²⁰ 296 NLRB 1213 (1989).

²¹ Chairman Stephens, for institutional reasons, joins Member Raudabaugh in affirming the Regional Director’s decision to permit Petitioner additional time to submit the requisite showing of interest in the multiemployer bargaining unit, in recognition that *Brown Transport Corp.*, supra, in which he dissented, is dispositive in the absence of a majority to overrule it.

The facts surrounding the September 1982 Honest Ballot Association election are critical to my disagreement with my colleagues. Prior to that time, the Association, of which Casale and Miller were a part, had bargained with the Sheet Metal Workers' International Union for a series of 8(f) agreements. The September 1982 Honest Ballot Association election purportedly resolved a dispute between Local 22, which had broken away from the International, and Locals 19, 27, and 28 of the International, as to the representation of employees employed by the 26 Association members. The election, which was conducted on an Association-wide basis, where the ballots of all the employers' employees were aggregated, resulted in a victory for Local 22.

Of critical significance, the Honest Ballot Association's ballot contained just two choices: Local 22 or Locals 19, 27, and 28 together. The employees did not have the opportunity to vote "no union." Thus, the 1982 election did not establish whether a majority of the employees wanted a union at all.

Undisputedly, a collective-bargaining relationship in the construction industry is presumed to be governed by Section 8(f) rather than by Section 9(a) until proved otherwise. *John Deklewa & Sons*, 282 NLRB 1375, 1385 fns. 41 and 42 (1987), enf'd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988). That presumption is a strong one, and the showing necessary to overcome it and to establish 9(a) status thus must be persuasive. See, e.g., *Stack Electric*, 290 NLRB 575 (1988) (8(f) and single-employer unit presumptions continue, notwithstanding long-term authorizations to multiemployer associations to act as collective-bargaining representative); *Brannan Sand & Gravel Co.*, 289 NLRB 977 (1988) (series of collective-bargaining agreements over a 30-year period does not change 8(f) presumption).

Because the Honest Ballot Association's ballot did not contain a "no union" choice, I would find that Local 22 has not overcome the *Deklewa* presumption of Local 22's continuing 8(f) status and persuasively established that it was in fact the 9(a) representative in the multiemployer unit. With good reason, all Board elections where a union initially seeks to establish its majority status include on the ballot a "no union" choice. The philosophy embodied in the fundamental Section 7 right to refrain from self-organization demands no less. See generally *Pattern Makers League v. NLRB*, 473 U.S. 95 (1985). By not having the "no union" choice, the Honest Ballot Association ballot was in derogation of that essential right. It was a choice of who the representative would be. It was not a choice of whether to be represented by a labor organization. We will never know whether Local 22 would have received a majority in September 1982 had the employees had the choice of voting "no." Consequently, I would not give the September 1982 vote any weight in establishing Local 22's 9(a) status.

Because Local 22 has offered no other proof of its majority status, I would find that to this day it is an 8(f) representative. Under *Deklewa*, this 8(f) bargaining history in the multiemployer unit cannot bar the petitions for the separate units at Paul Miller and Casale. Accordingly, I dissent from the refusal to allow these employees to decide whether to be represented by a labor organization.¹

¹ I need not and do not reach the question whether, if the bargaining relationship between the Association and Local 22 became a 9(a) relationship in 1982, a reasonable time in which to challenge Local 22's majority status in the Casale and Paul Miller units has elapsed such that the petitions for the separate units at Paul Miller and Casale would now be barred.